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In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. 429

ALFRED B. CENEDELLA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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1.

Petitioner Alfred B. Cenedella, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the First Circuit, entered in the above entitled case on August 5, 1955.

Opinion Below

The opinion of the Court of Appeals is dated August 5, 1955, and is reproduced in the Appendix hereto starting at page 15.

Jurisdiction

The judgment of Court of Appeals was entered on August 5, 1955. A petition for rehearing was denied on August 31, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1) and rules 37 (b) and 45 (a) of the Federal Rules of Criminal Procedure.

Questions Presented

1. Did the trial court and the Court of Appeals err in refusing to rule that a final decree of a Massachusetts Probate Court, a court of record, was a final adjudication of the facts set forth therein?
2. Did the trial court err in its failure to instruct the jury on the law as decided by this Court in *Commissioner* v. *Wilcox,* 327 U.S. 404?
3. Did the trial court err in its handling of the jury, after it called the jury to the court room when it had been out eleven hours, and thereby deprive the defendant of due process of law?

Statement of the Case

Defendant was indicted for violation of Section 145 (b) of the Internal Revenue Code. It was charged that the defendant did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America, by filing a false return in which his income was understated and his tax under-reported. The indictment was in four counts, charging a violation for each of the years 1947, 1948, 1949 and 1950.

The Government's case was based on alleged items of unreported fees received by the defendant from his law

practice. At the outset, for each of the years in issue, the defendant admitted certain unreported income which he testified was omitted from his return by mistake due to a change of personnel in his office, (R. p. 345-6). As to various other items which were unreported, the defendant introduced evidence to show that they were not taxable income, but repayments of loans, gifts, repayment of expenses, or were taxable in another year.

The Government introduced evidence to controvert the defendant's position with regard to these latter.

The largest single item in all four years over which the Government and defendant were in conflict was the sum of approximately Nine Thousand Three Hundred Dollars which came into the hands of the defendant from the estate of Vincenzo Coccavelli. This amount represented almost one-third of the alleged unreported income and almost one-half of that which was in dispute.

The defendant had been guardian for Vincenzo Coccavelli, an insane person, from 1920 until 1946 when Coccavelli died. He was survived by certain heirs in Italy who appointed the defendant their attorney in fact (R. p. 68). Alfred B. Cenedella, Jr., the defendant's son, was appointed administrator of the estate of Coccavelli on October 10, 1946. The estate was substantially closed in the year 1948. The defendant testified that in 1947 he caused to be transferred to himself certain stock of the Home National Bank of Milford. The defendant further testified and produced evidence to the fact that the value of the stock was Sixteen Hundred Ten Dollars at the time of such transfer (R. p. 321). The Government produced evidence to show the value to be Twenty-three Hundred Dollars (R. p. 122). This stock was taken by the defendant for his services as attorney for the administrator. He further testified (R. p. 352) that his son was entitled to a fee of Two Thousand Dollars as administrator and that his

son paid the sum to him as repayment of advancements and loans made during the prior years to help the son establish his home. This left in the defendant's hands in 1947 the amount of Five Thousand Seven Hundred Fifteen Dollars. He testified that this amount had been retained by him through error (R. p. 356), that he did not realize he had it until the witness Rowe, an accountant, completed an audit of his books in the summer of 1954. When it was ascertained that he had this money, which he realized was not his, he dispatched it to the heirs in Italy (R. p. 351). The Government did not dispute that this was done (R. p. 415).

On November 23, 1954, after the indictment, but before the trial, Alfred B. Cenedella, Jr. had allowed in the Probate Court for Worcester County his first and final account as administrator of the estate of Vincenzo Coccavelli, to which the defendant assented as attorney in fact for the heirs in Italy. This account, showing the decree allowing it, was admitted in evidence as defendant's Exhibit C.

The facts as to Question 2 pertaining to the handling of the jury show that the Judge finished his charge and the jury took the case at approximately 10:00 a.m. The jury was still deliberating eleven hours later when the Judge directed that they be returned to the courtroom. The jury returned at 9:00 p.m. when this colloquy took place (R. p. 460):

> "The Court: Mr. Foreman, I take it that there is no prospect of your agreeing within the next five or ten minutes.
>
> "The Foreman: Well, I wouldn't qualify it as to five or ten minutes, your Honor.
>
> "The Court: I thought that, at least counsel and I thought—I suggested it and they agreed that possibly I might say a few general words to you, and

then I will ask you whether there is some specific thing you would like to be told about."

The Judge then read an abstract from *Commonwealth* v. *Tuey,* 8 Cushing 1 (R. p. 460).

Then the following was said:

"Now, Mr. Foreman, if there is anything in my charge that you would like to have repeated, if there is any subject on which you would like further illumination from the charge, or if there is any evidence you would like to hear, I will hand you a pad and you may address any questions to me that you wish, being not just the decision of one of you as to the questions, but you should confer briefly among yourselves so that you agree as to what it is that I am being asked.

"The Foreman: Right here, your Honor?

"The Court: Yes, you may. If you prefer to go upstairs and do it, you may do that.

"Mr. Foreman: I don't think that will be necessary, your Honor.

(Conference between jurors)

"The Foreman: I feel, your Honor, that we are reasonably close to a decision, a verdict.

"The Court: That is fine. That was why I brought you down, to find out whether you were or were not. We will await you, and naturally, you may take as long as you feel you should. If you do change your mind and want any questions answered, why, we will be here.

"The Foreman: Thank you."

The jury then retired and returned with a verdict of guilty on all four counts at 9:20 p.m.

Reasons for Granting the Writ

1. The holding of the Court below is in conflict with the holding of this Court in *Freuler* v. *Helvering* (1934) 291 U.S. 35, and with a holding of the Circuit Court of Appeals for the 8th Circuit in *Eisenmenger* v. *Commissioner* (1944) 145 F.2d 103, and with a holding in *Smith* v. *Gallagher*, in the Court of Appeals for the Third Circuit, (1955) 223 F.2d 218. It is submitted that in each of these cases the decree or judgment of a state Probate Court or its equivalent was held to be binding on the Federal Court. In each of these cases, the Government sought to include as taxable income amounts which the state courts held were not income. This Court and the Courts of Appeal held that the Government was precluded from so doing.

2. The failure of the Judge to instruct the jury on the rule announced in *Wilcox* v. *United States,* 327 U.S. 404 was prejudicial error and deprived the defendant of his Constitutional rights.

3. The manner in which the Judge questioned the jury, and his permitting the jury to deliberate in the courtroom was prejudicial and deprived the defendant of his Constitutional rights.

Argument

In the instant case, a decree was entered on November 23, 1954, which adjudicated that the defendant received a fee of Fifteen Hundred Dollars as counsel for the administrator in the Coccavelli estate. (Defendant's Ex. C) The Government's announced position was that the entire Ninety-three Hundred Dollars retained by the defendant was consciously kept as a fee and therefore should have been reported as income.

The Court of Appeals recognized that the decree of the

Worcester Probate Court was binding on the parties to it. It is conceded that since the Government was not a party to the case, the decree would not be res judicata or entitled to full faith and credit as to it.

However, the defendant contends that the decision of the Worcester Probate Court adjudicated a question of substantive law. A decision setting fees affects the property rights of the heirs of an estate as well as the rights of the representative. It also adjudicates that services have been performed by the representative for which payment is due. In *Ryder* v. *Ryder,* 322 Mass. 645, it was held that a guardian's final account, showing a balance due her for money advanced, when allowed, had the effect of a judgment in her favor. In other words, a decision was rendered setting forth the law of the Commonwealth of Massachusetts with regard to this particular case, and as such it was binding on the trial court and the Court of Appeals.

It is submitted that the Court of Appeals for the Third Circuit, which decided *Smith* v. *Gallagher* (1955) 223 F.2d 218, would have ruled that the Probate Decree here was binding on the Government and that its effect could not be varied in the case at bar. That court held that a property right had been adjudicated, although the right was far more nebulous than that in the case at bar.

In the *Gallagher* case, a widow was named life beneficiary of a large trust which had spendthrift provisions. In order to spread the income tax burden, she renounced all but a thirteenth interest in the trust, which resulted in the remaining twelve-thirteenths of the trust income being distributed among twelve of her children equally.

The state court held that even though her renunciation was revocable under Pennsylvania law since this trust contained spendthrift provisions, while her renunciation remained unrevoked, the income was payable to the children. In other words, it found in fact that the right had been

renounced, although it was clear that the renouncement was illusory since it could have been revoked at any time. The Government sought to impose the tax on the grounds that she was entitled to the income, but the decision of the state court was held to have decided the issue.

While conceding that the decree in this case has effect for some purposes, the Court of Appeals said:

"It does not adjudicate or attempt to adjudicate that the appellant did not . . . take a larger fee than was substantially allowed. . . ." Inferentially, the Court ruled that the decree did in fact set the fee. But the Court went on to say the amount adjudicated "does not determine the question whether or not in 1947 the appellant claimed as of right and took a larger fee which, on second thought, he later reduced to the amount he finally claimed. . . ." In other words, the "claim of right" theory is introduced to show income in the defendant's hands in 1947.

But the record is bare of any evidence that the defendant ever claimed any portion of the Coccavelli money other than that allowed by the Court as his own as a matter of right. Nor did the Government show or even attempt to show that he was claiming the money as a matter of right. Instead, the whole tenor of the Government cross examination as seen from the record and as practically admitted in its brief before the Court of Appeals, was designed to show that the defendant embezzled the Coccavelli funds and thus prejudice him with the jury.

In brief, the Court of Appeals recognizes the valid principal of the *Gallagher* case, which it cites, but then seeks to avoid it by use of the "claim of right" doctrine. It is submitted that in each case where the question arises, the same device would defeat the state court.

In *Freuler* v. *Helvering*, 291 U.S. 35, the beneficiaries of a trust were paid money which many years later the California Court held should have been held by the trustees

for depreciation. In that case there could be no question that the beneficiaries received the money under a "claim of right" since not the slightest question had been raised as to the propriety of paying them. In addition, certain of the beneficiaries, after the order of the court, never repaid the amount erroneously paid them except by unsecured promissory notes. They continued to enjoy the benefit of their income without being required to pay the tax.

Nevertheless, this Court held that the California decree was an "order" within the meaning of the statute and that the taxing authority was bound thereby.

A case of similar import is *Eisenmenger* v. *Commissioner*, 145 F.2d 103, decided by the Eighth Circuit in 1944. There the state court held that certain income was not distributable to the taxpayer. The Government objected on the ground that the state court decree did not control because the proceedings which resulted in the decree were not truly adversary and the decree was entered after the original decision of the Tax Court which decided the question adversely to the taxpayer. The court pointed out that the Minnesota statute, under which the decree was entered, declared the proceeding to be in rem. The allowance of a fiduciary's final account in Massachusetts, while it may operate as a personal judgment (*Ryder* v. *Ryder*, 322 Mass. 645), also has all of the elements of an action in rem. *Bonnermort* v. *Gill*, 167 Mass. 338. In any event it is far more than a procedural or incidental decision. It should also be noted that aside from the different value assigned to the Home National Bank stock, there is no argument made that the account was inaccurate.

It is submitted that the trial court and the Court of Appeals erred when they refused to rule that the Worcester County probate decree could not be impeached, and such error substantially prejudiced the defendant in the eyes of the jury.

Failure to Charge on the Wilcox Doctrine

When the Government first sought to introduce the Coccavelli evidence, it advanced the "claim of right" theory as grounds for its admissibility. (See record pp. 65, 66, 71). The Trial Court apparently admitted the evidence on the theory that the Government would show a claim of right. But the Government then proceeded to abandon entirely its announced grounds, and by its vicious cross-examination of the defendant, sought to show general mismanagement of the Coccavelli funds (See R. pp. 404-417).

The defendant's position always was that he had received the Coccavelli money by mistake. The Government in its cross-examination sought to imply that the defendant had embezzled these funds. The result of the cross-examination brought this element of embezzlement into the case. The defendant did not do this, and because of his position that the money was received by him by mistake, naturally enough he did not request any ruling on the Wilcox rule. The Trial Judge's position is quite different, however. He was aware that this embezzlement element was deliberately dragged into the case by the Government. The implications of the Government's attack obviously weighed heavily in the minds of the jury. Under these circumstances it was the duty of the Trial Court to instruct the jury on the Wilcox Doctrine. His failure to do so constitutes reversible error.

The Interference with the Jury

The cases of *Brasfield* v. *U. S.* (1926) 272 U.S. 448 and *Burton* v. *U. S.* (1905) 196 U.S. 283, establish certain fundamental principles of law regarding the proper relation of the court to the jury and also the duties and rights of the jury itself.

These cases establish clearly that there should be no inquiry from the jury by the judge concerning the jury's numerical division. Defendant submits that they also stand for two basic rules, namely

1. That no question should be asked by the court that tends to require the jury to reveal any matter that pertains to the secrecy of the jury room; and
2. That no questions should be asked which bring to bear in some degree, serious, although not measurable, an improper influence upon the jury from whose deliberations every consideration other than the evidence and the law as expounded in a proper charge should be excluded.

The court has the right to inquire of the jury as to whether or not they have agreed upon a verdict and also to inquire whether they desire any further charge to help them decide the case. Such procedure does not have the tendency to invade the secrecy of the jury room.

In the case at bar the judge on the surface was following the basic rule. It is also clear that he intended no prejudice to the defendant. The question is not what the judge's intention may have been, nor what he had in his own mind, but principally, what effect did his words have upon the minds of the jurors. And that effect can only be measured by what happens after he speaks—when it is far too late for any objections. Hindsight only can be of any value in a situation such as this.

In this case the jury had been considering the case from 10.00 a.m. to 9:00 p.m., eleven hours, including two meals, and then was brought into the court for the first time and the first statement made by the court was, "Mr. Foreman: I take it that there is no prospect of you agreeing within the next five or ten minutes", (R. p. 460).

It must be remembered that the jury returned to the court room at 9:00 p.m. It was Friday night. Time was emphasized by the court. When the jury was called in, they had been in disagreement for eleven hours, and then inside of three minutes after being out eleven hours, the foreman announced in open court, after conference in the jury box:

> "I feel, your Honor, that we are reasonably close to a decision, a verdict".

The deliberation of the jury was interrupted and when this is done there must be exercised by the court most extreme care and caution where necessary in order that the legal rights of the defendant should be preserved. See *Burton* v. *U. S.*, 196 U.S. 283.

Can there be any doubt but that the calling in of the jury and what happened in the court room produced an immediate verdict?

It is true, that the trial court did not require the jury to reach its verdict in the court room, but based on the record it is a fact that the conference held in the jury box, among the jurors, because of what had just transpired in the court room, tended to produce and did produce a result that eleven hours of previous deliberation had not accomplished. See American Jurisprudence, Section 952 and also Section 958.

> "The propriety of the judge's remarks addressed to a jury after retirement for deliberations must be measured by the language employed, not the motive of the judge; and from the language used a fair and reasonable conclusion must be deduced as to the tendency to interfere with the exercise of the free and unbiased judgment of the jurors. The ultimate test, it has been

observed, would seem to be whether the additional instruction forced or helped to force an agreement, or whether it merely started a new train of real deliberation which ended the disagreement. It has been observed that the fact that a verdict is rendered soon after a court's admonition notwithstanding previously inability to agree after prolonging deliberations, reasonably shows or gives rise to an inference that the verdict is not uninfluenced by what was said".

Meadows v. *State*, 182 Ala. 51, *Middle States Utilities Co.* v. *Incorporated Teleph. Co.*, 222 Iowa 1275.

"Any instruction which tends unduly to hasten the jury in a consideration of a case in inappropriate".

The record shows (R. p. 460) that counsel agreed that the judge might say a few general words. Surely just what was to be said was wholly within the knowledge of the trial judge himself.

The *Brasfield* case, cited above, declares that failure of counsel to particularize an exception does not preclude this court from correcting the error and continues:

"This is especially the case where the error, as here, affects the proper relations of the court to the jury, and cannot be effectively remedied by modification of the judge's charge after the damage has been done".

It further appears from the record (pp. 460-461) that the Court of Appeal, erred in reaching the conclusion that:

"All that the jury decided in the court room was that it did not desire any further instructions. . .".

The Foreman's statement:

"That we are reasonably close to a decision, a verdict", clearly indicates that the conference held in court resulted in the jurors agreeing to agree.

Hurry and haste seem to be the keynote of the tense situation—three minutes—the jury leave the court, goes upstairs to the jury room—court recesses to its lobby. The jury bell sounded, bailiff responds—court informed—jury returns to the court room—court re-enters from lobby—clerk inquires—jury reports. It is then 9:20 p.m. Is this a calm, deliberate consideration of the evidence? Is it an unhastened verdict?

The first statement made by the judge to the jury gave them the right believe that something was going to happen in five minutes or ten minutes. It is not unreasonable to conjecture that the uppermost thought in the jurors' minds concerned whether they would be locked up for the weekend if they failed to agree.

They could avoid that eventuality by agreeing in a hurry, and if that is the basis of their final verdict, it is error.

The question raised goes to the substantial constitutional rights of a defendant to have the jury decide a given case without being unduly hastened and influenced by outside considerations.

Conclusion

On the grounds set forth above, defendant respectfully submits that the writ of certiorari should issue.

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Appendix

OPINION OF THE COURT.
August 5, 1955

WOODBURY, *Circuit Judge.* A jury in the court below found the appellant guilty on all four counts of an indictment charging evasion of income taxes in violation of § 145 (b) of the Internal Revenue Code, Title 26 U.S.C. § 145 (b), for the four calendar years from 1947 to 1950, inclusive, and the court sentenced him to concurrent terms of imprisonment on each count and on each count to pay a separate fine of $500.

The appellant admitted at the trial that he had understated his income in the joint returns he filed for himself and his wife for each of the years covered by the indictment. His contention was, and is, that his omission of items of income was not willful but inadvertent, or at the most, the result of his or his secretary's carelessness. However, the number of income items concededly omitted each year, and their gross amounts, clearly warranted the jury in rejecting the appellant's contention and instead concluding that the items were willfully omitted by the appellant in an attempt to evade or defeat his income tax obligations for each of the four years involved. Further elaboration is unnecessary for the appellant only half-heartedly contends that the District Court erred in denying his motions under Criminal Rule 29 (a) for the entry of a judgment of acquittal on each count of the indictment.

We turn, therefore, at once to the consideration of those matters which the appellant contends entitle him to a new trial.

The appellant was admitted to the Massachusetts Bar in

1910 and he has lived and practiced his profession in his native town of Milford ever since. Throughout his professional life he has been active in civic affairs. He served on the local school committee for over twenty years; he was Town Solicitor of Milford for five years and Town Solicitor for the adjoining town of Mendon for twenty-five years. In addition to holding local office, he served on the Massachusetts Industrial Accident Board from 1930 to 1935 when he resigned to become First Assistant to the District Attorney for Worcester County. He held that office for twelve years and in 1946 he was elected District Attorney. In 1950 he was re-elected for another four-year term at the end of which he retired.

The Government does not contend that the appellant understated his salary as District Attorney during the four years covered by the indictment. Its contention is, and the appellant concedes, that during those years he understated the income he derived from the private practice of the law which he carried on part time during his service as District Attorney. While many omissions of items of income from this source were agreed upon in a series of stipulations entered into by opposing counsel, other omissions alleged by the Government were not, and it undertook to prove these disputed items by documentary evidence and the testimony of witnesses. Two of these disputed items must be considered in some detail. One involves the administration of the estate of Coccavelli and the other a transaction with one Swartz.

The appellant in 1920 was appointed guardian of Vincenzo Coccavelli, an insane person, and he continued to serve in that capacity until 1946 when Coccavelli died intestate leaving an estate of about $35,000 and four heirs residing in Italy. The heirs appointed the appellant their attorney in fact and in October, 1946, the appellant's son, then a law student, was appointed administrator of the Coccavelli es-

tate. The appellant acted as counsel for his son as administrator and as such he apparently handled most if not all transactions involving the estate.

The Government introduced evidence at the trial to show that in 1947 the appellant obtained stock and cash from the Coccavelli estate to the value of over $9,000 which he did not report as income in his return for that or any other year. It showed specifically that in July, 1947 the administrator transferred stock of the estate in the Home National Bank of Milford worth $2,300 to the appellant, and that in the same year, at one time or another and in one way or another, over $7,000 in cash found its way from the estate to the appellant's personal checking account and was subsequently used by him as though it were his own, except for $318.29 which he transmitted by personal check to the heirs in Italy in February, 1948, noting on his check stub "In full Coccavelli Est.".

The appellant objected to the introduction of the above evidence on the ground that it was both irrelevant and prejudicial. He said that the evidence was irrelevant because its only tendency was to show that he had embezzled funds from the Coccavelli estate, and in *Commissioner* v. *Wilcox*, 327 U.S. 404 (1946), it was held that embezzled money does not constitute taxable income to the embezzler. And he said that the evidence was so highly prejudicial as to prevent the possibility of his having a fair trial not only on the first count of the indictment covering the year 1947, but also on the three remaining counts covering the three succeeding years as well. Nevertheless, the court below overruled the appellant's objection and admitted the evidence on the Government's theory that from it the jury could infer that the appellant had taken the stock and money from the Coccavelli estate in payment for his services as counsel for the administrator and as attorney in fact for the heirs.

When the appellant took the stand in his own defense he admitted that he had received assets of the Coccavelli estate as shown by the Government. He contended, however, that the Home National Bank of Milford stock was not worth $2,300 at the time it was transferred to him, as the Government contended, but was worth only $1610, and that he took it in payment of his fee for services of $1500 and to reimburse him for his expenses of $110. He said that of the cash, $2,000 was his son's fee as administrator which was paid directly to him in partial repayment of loans made over past years to his son, and the remainder, amounting to nearly $6,000, got into his personal checking account by mistake and that he spent it inadvertently.

Furthermore, the appellant introduced in evidence the first and final account of his son as administrator of the Coccavelli estate which was filed in the Probate Court for Worcester County on November 24, 1954, and was allowed on the day it was filed at the request of the appellant as attorney in fact for the heirs. This account shows a payment to the appellant on July 17, 1947, of $1610, consisting of Home National Bank stock, for fees and expenses; a payment of an administrator's fee of $2,000 to the appellant's son on October 22, of that year; and a distribution on February 16, 1948, of $5,725.26 to the appellant for the Coccavelli heirs. The appellant admitted, however, that he did not actually remit the latter sum to the heirs until December 1954, after the account was allowed, and about eleven months after he was indicted.

The District Court recognized that the *Wilcox* doctrine did not cover all of the evidence with respect to the Coccavelli estate because of the appellant's claim that part of the money he received from the estate was in payment of fees and expenses. But, at the appellant's earnest request, the court did not charge on the *Wilcox* rule at all. Instead, the court without objection by the appellant charged the

jury that it was not to consider the $5,000 odd taken from the Coccavelli estate as unreported income for the year 1947 if it should find that the appellant did not realize that he had that money in that year, for "then obviously he could not be expected to have reported it," and the jury was not to concern itself with honest mistakes. The jury was also told that on the other hand, if it should find that the appellant had consciously retained some or all of the above sum, in addition to the bank stock, for his professional services as counsel for his son, the administrator, and as attorney in fact for the heirs, then it could find "that what he so took for that purpose was taxable income" which should have been reported in his income tax return for 1947.

The appellant at the trial clearly abandoned his contention based on the *Wilcox* case and he has not attempted to revive it in his brief. His present contention is that the evidence pertaining to the estate of Coccavelli should have been excluded for the reason that its admission constituted a collateral attack on the decree of the Probate Court for Worcester County allowing the administrator's final account.

We do not brush this contention aside as an afterthought for it was briefly mentioned in passing at the trial. Nor can we treat the contention as applicable only to the first count covering the year 1947 and sustain the judgment without considering it, for although the prison sentences on each count were concurrent the fines on each count were separate, and, furthermore, the appellant contends that the prejudice resulting from the admission of this evidence deprived him of a fair trial on all counts. We find the contention, however, to be wholly without merit.

Since the appellant's son was the administrator of the Coccavelli estate, and the appellant himself was not only counsel for his son as administrator but also attorney in fact for the heirs, and as such requested allowance of his

son's final account as administrator, it would seem that the appellant, by relying on the judicial allowance of the account as the ground for excluding the evidence of his dealings with the estate's assets, was attempting to lift himself by his own bootstraps. See *Wolfsen* v. *Smyth*, decided by the United States Court of Appeals for the Ninth Circuit, May 25, 1955. However, the decree of the Probate Court as to the amount of the appellant's fee, although perhaps binding on the heirs, is not binding on the Government under the doctrine of *res judicata* for the Government was neither a party, nor the privy of a party, in the accounting proceeding. Moreover, while the decree may adjudicate the amount of the appellant's fee so far as the heirs are concerned, it does not adjudicate, or purport to adjudicate, the appellant's prior dealings with assets of the estate. See *Gallagher* v. *Smith*, decided by the United States Court of Appeals for the Third Circuit, June 3, 1955. That is to say, it does not adjudicate, or attempt to adjudicate, that the appellant did not, some seven years before, take a larger fee than that subsequently allowed and then later abandon his claim to the larger amount and remit the balance to the heirs. In short, the 1954 decree of the Probate Court, while for some purposes fixing the appellant's fee at $1500 and his expenses at $110, does not determine the question whether or not in 1947 the appellant claimed as of right and took a larger fee which on second thought he later reduced to the amount he finally claimed and was allowed. See *United States* v. *Lewis*, 340 U.S. 590 (1951).

We turn now to the Swartz matter.

The Government introduced evidence to show that the appellant had been co-executor under the will of one Catherine Green; that he had assisted his fellow townsman, landlord and neighbor, Swartz, in negotiating for the purchase of a business block in Milford belonging to that estate, whereby Swartz had been able to purchase the property at

a saving of approximately $9,000 or $10,000; and that upon consummation of the sale in October, 1949, Swartz gave the appellant $4750 in cash which the appellant noted in his diary as a "gift" and never reported as income. It was the Government's contention that from this evidence the jury could properly find that the money received from Swartz was not a "gift" but a payment for valuable services rendered, and so conclude that the appellant ought to have reported the $4750 as income in the year received.

The appellant admitted that he had done what he could to help Swartz purchase the property from the Green estate and that Swartz had given him $4750 in cash at the time the transaction was closed. But he contended that the money was a "gift", as he had noted in his diary, and not a payment for services rendered. The issue of fact presented by the foregoing evidence was submitted to the jury under instructions which were not objected to.

We come now to the gist of the appellant's complaint. The Government summoned Swartz as a witness, and he was present in the courthouse with the other government witnesses for three days during the trial, but he was not called to the stand by either the Government or the appellant. The court in its charge mentioned that Swartz had not appeared in court and told the jury that no inference was to be drawn for or against either party because of his absence. It is conceded that Swartz, if called, would have testified that he never gave the appellant $4750, or any other sum, and both the Government and the appellant knew that he would so testify.

The appellant does not contend that the Government concealed Swartz where he could not be found. Nor does the appellant contend that he was prevented by the Government from finding out what Swartz's testimony would be. His contention is that it was the duty of Government's counsel to put Swartz on the stand and present his testi-

mony to the jury for its consideration, and that the failure of counsel for the Government to do so was highly prejudicial to his cause. The contention is refuted by its statement.

The Government is privileged not to call witnesses in whom it has no confidence and there is little reason to have confidence in Swartz. Nor is it any part of the Government's duty to present evidence for the defense. Moreover, had it put Swartz on the stand, it would have been open to the accusation of prejudicing the jury by impeaching the appellant's credibility, for he had testified categorically that Swartz gave him $4750, or possibly, as the court below noted, indicating a consciousness on the part of Swartz that he and the appellant had engaged in a shady transaction. At any rate the appellant knew where Swartz was and knew what Swartz would say if he were called to the witness stand. He could have called Swartz had he wanted to, by process if necessary, and his failure to do so cannot be charged against the Government.

Only one more matter requires specific consideration.

The jury took the case and retired to consider its verdict about 10 o'clock in the morning. At nine o'clock that evening the court called the jury back into the courtroom and in the presence of the appellant and counsel on both sides asked the foreman if there was any prospect of the jury reaching an agreement within the next five or ten minutes. The foreman replied that he did not think agreement could be reached within quite so short a time, and the court then urged the jurors to reach an agreement if they conscientiously could using language approved by the Supreme Judicial Court of Massachusetts in *Commonwealth* v. *Tuey*, 8 Cushing 1.

The following colloquy then ensued:

> The Court: . . . Now, Mr. Foreman, if there is anything in my charge that you would like to have re-

peated, if there is any subject on which you would like further illumination from the charge or if there is any evidence you would like to hear, I will hand you a pad and you may address any questions to me that you wish, being not just the decision of one of you as to the questions but you should confer briefly among yourselves so that you agree as to what it is that I am being asked.

The Foreman: Right here, your Honor?

The Court: Yes, you may. If you prefer to go upstairs and do it, you may do that.

The Foreman: I don't think that will be necessary, your Honor.

[Conference between jurors]

The Foreman: I feel, your Honor, that we are reasonably close to a decision, a verdict.

The Court: That is fine. That was why I brought you down, to find out whether you were or were not. We will await you, and naturally you may take as long as you feel you should. If you do change your mind and want any questions answered, why, we will be here.

The Foreman: Thank you.

The jury then retired at 9:03 to return at 9:20 with a verdict of "guilty" on all four counts of the indictment.

The appellant registered no objection to these proceedings at the time. Indeed, through his counsel at least, he appears to have fully acquiesced in all that was done. Now, however, he contends that the court brought improper pressure to bear on the jury and in effect coerced it into bringing a verdict of guilty. He says that in effect the court asked the jury how it stood numerically with respect to a verdict, which the Supreme Court condemned in *Burton* v. *United States*, 196 U.S. 283, 307, 308 (1905), and held to be prejudicial error calling for reversal in *Brasfield* v. *United States*,

272 U.S. 448, 450 (1926), and also that the court required the jury to reach its verdict in open court, where it was subject to the imponderable but nevertheless pervasive influence of the bailiffs and other court attaches, instead of in the privacy of its jury room.

Again the statement of the contention demonstrates its lack of merit. The trial court did not poll the jury in advance of verdict as in the cases last cited. Instead it merely inquired as to the prospects of agreement to find out if further instructions would be helpful—certainly a reasonable inquiry, for if the jury were on the verge of agreement further instructions would not have been necessary. Nor did the court require the jury to reach its verdict in the courtroom. All that the jury decided in the courtroom was that it did not desire any further instructions, and, having decided that, it retired to its room to consider the case further, returning several minutes later with a verdict. We see no error in the way the court handled the jury.

The appellant further contends that the court below fell into several other serious errors affecting his substantial rights which we should notice under Criminal Rule 52 (b) even though they were not brought to the attention of the court at the trial. We have examined these assertions of error and found them all without merit. We shall not mention them in detail. It will suffice to say that the record discloses a trial fought hard but cleanly by counsel on both sides and conducted from the bench with scrupulous regard for the appellant's rights.

The judgment of the District Court is affirmed.

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